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THE WAY TO A SAFE, SECURE & EFFICIENT CANADA- UNITED STATES BORDER

Speaker – Dan Ujczko
Speaker – Richard Gordon
Speaker – Stephen E. Flynn, Ph.D.

INTRODUCTION

Dan Ujczko

MR. UJCZO: Good evening. I am Dan Ujczko, the Managing Director of the Canada-United States Law Institute.¹ On behalf of the Institute, our two founding institutions,² Case Western Reserve University School of Law and the University of Western Ontario Faculty of Law, I welcome you to our 24th annual conference. And of greatest significance, I welcome you to this dinner celebrating the 25th year of leadership of our institute by our chairman, Dr. Henry T. King.

While this evening will be a great celebration, we are faced with a very practical reality, that tonight's distinguished speaker has to catch a flight very soon back to New York. So Steve Flynn has graciously agreed to an abbreviated dessert, actually to forego dessert, as well as to present his remarks while there is the clanging and service of that fine product of Canada. All of the wine that is served this weekend is from Canada, as well as our soft drinks are products of our long-standing supporter, Coca-Cola.

So we will turn quickly to our presentation, but please feel free to dine on this tremendous meal at this terrific venue. So without further ado, I now introduce Professor Richard Gordon, our U.S. Director at Case Western Reserve University School of Law,³ who will in turn introduce our speaker. Thank you.

¹ See, Canada-United States Law Institute, About the Institute, CUSLI Staff, <http://www.cusli.org/about/staff.html> (last visited Sept. 18, 2008).

² Canada-United States Law Institute, About the Institute, History, <http://www.cusli.org/about/history.html> (last visited Sept. 18, 2008).

³ Canada-United States Law Institute, About the Institute, Founding Institutions & National Directors, http://www.cusli.org/about/founding_institutions.html (last visited Sept. 18,

SPEAKER

Richard Gordon

MR. GORDON: I am really very pleased to have everyone here this evening. Thank you so much for coming, and thank you, Steve Flynn, for coming here from New York.⁴ I will say you are a Gene Kirkpatrick Senior Fellow for National Security Studies at the Council on Foreign Relations,⁵ and you are the author of so many wonderful books: *The Edge of Disaster: Rebuilding a Resilient Nation*, and I think that was a national bestseller.⁶ You have been on TV,⁷ you have been on the web,⁸ and you have been quoted repeatedly in the New York Times and in other newspapers.⁹ So rather than have me continue with this introduction, I would like you to come up here and speak and say something quotable. Thank you very much.

2008).

⁴ See, Stephen E. Flynn, Council on Foreign Relations, http://www.cfr.org/bios/3301/stephen_e_flynn.html (last visited Sept. 18, 2008).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ See, E.g., Stephen E. Flynn & James M. Loy, *A Port in the Storm Over Dubai*, N.Y. TIMES, Feb. 28, 2006; Stephen E. Flynn, *Our Hair is on Fire*, WALL ST. J., Dec. 16, 2004.

SPEAKER

*Stephen E. Flynn, Ph.D.**

DR. FLYNN: Thank you so much. It is an honor to be with all of you tonight, and I really want you to partake in the calories, and I will try to add a little bit of the ambience of the place by offering a few words. When I got this invitation just to address all of you tonight in recognition in large part to Professor King's 25th year, it was simply an offer I could not refuse. And so, Professor King, it is just a privilege to be here with you tonight and to celebrate this very special anniversary, and I commend you for all you have done on behalf of Canada-U.S. relations.

Naturally the topic picked for this year's meeting was music to my ears. Allow me to give a little bit of background. I have arrived at what I am doing as a Coast Guard officer. I graduated from the Coast Guard Academy back in 1982.¹⁰ In fact, I have a classmate here, Michael Parks, who was Chief of Staff in the Ninth District,¹¹ and it is been great to get reconnected with him up here in Cleveland.

But out of that, being on the "applied side" of border management, it led to a project in 1999 when I first arrived at the Council of Foreign Relations,¹² which was to look at all the issues of border management in

* Stephen Flynn is the Jeane J. Kirkpatrick senior fellow for National Security Studies at the Council on Foreign Relations. He is the author of the critically acclaimed *The Edge of Disaster: Rebuilding a Resilient Nation* (Random House, 2007), and the national bestseller, *America the Vulnerable* (Harper Collins 2004). At the Council, Dr. Flynn directs an ongoing private sector working group on homeland security. He was the Director and principal author for the task force report *America: Still Unprepared - Still in Danger*, (2002) co-chaired by former Senators Gary Hart and Warren Rudman. Dr. Flynn is a Consulting Professor at the Center of International Security and Cooperation at Stanford University and a Senior Fellow at the Wharton School's Risk Management and Decision Processes Center at the University of Pennsylvania. Since 9/11 he has provided testimony on nineteen occasions on Capital Hill. He has served as the principal advisor to the bipartisan Congressional Port Security Caucus and is a member of the Marine Board of the National Research Council. He is a frequent media commentator and has appeared on Meet the Press, 60 Minutes, The News Hour with Jim Lehrer, The Today Show, Nightline, the Charlie Rose Show, CNN and on National Public Radio. Three of his articles have been featured in the prestigious journal, *Foreign Affairs*. Excerpts of his books have been featured in *Time*, as the cover story for *U.S. News & World Report*, as the subject of two CNN documentaries.

¹⁰ Council on Foreign Relations, *supra* note 4.

¹¹ See, United States Coast Guard, Atlantic Area Chief of Staff, <http://www.uscg.mil/LANTAREA/ccs.asp> (last visited Sept. 18, 2008).

¹² See, STEPHEN E. FLYNN, COUNCIL ON FOREIGN REL., GLOBALIZATION AND THE FUTURE OF BORDER CONTROL (2000) http://www.cfr.org/publication/8703/globalization_and_the_future_of_border_control.html.

the context of globalization. I thought there was sort of an interesting set of challenges here. The reality was the nature of the globalization, particularly with the evolutions of it, such as privatization, liberalization, and democratization. We are seeing an explosion in the volume and velocity of people's goods and conveyances across international corridors. Adversely, we are still in this West-feeling and hope, 'what goes there kind of way,' I would imagine, and it struck me that that was probably not sustainable. It was unsustainable largely because of two things.

One is there was a volume of velocity issue, that is the mechanism was not in line with what it had to control, but also because it was a broad range of public goods increasing which we call transnational express,¹³ which is becoming more and more apparent at the border, and which would lead to potentially, through the governance of the sale of public goods right, to a nativist kind of backlash arguing the world's response.¹⁴

What has animated most of my work since September 11th has not been so much the use of a border to find bad things, but really to push the opposite way, to get people to recognize that so many of the things that we worry about often at our borders are really tied to a much broader global set of challenges that need to be managed far from the border. My one takeaway from that project, which I wrote up in a Foreign Affairs piece back in 2000 called "Beyond Border Control,"¹⁵ was that borders are perhaps a tremendously attractive, seductive place to go for a description of the challenges and contradiction of globalization. They almost always are the worst places to go for prescription for how to deal with those challenges and contradictions. There are virtually no problems on the planet that originate at a border. They are almost all tied to a global network that is moving things that we want around in the global economy and, or, originate far from that geographical line in the sand, or river, or woods, or wherever it may be that we are looking at. And so in this context we really have to see ways in which we manage these problems within that globalized network.

My biggest fear when 9/11 happened therefore was not essentially the act itself, that it may have been somehow connected to our borders, which of course it turned out not to be,¹⁶ but was how we would react to that. And that is what pretty much informs a bulk of my concern about how we deal with the threat environment we are in. At its core I would make a case to Americans as this: the biggest threat to this nation is not what terrorists can

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Stephen E. Flynn, *Beyond Border Control*, FOREIGN AFF., Nov./Dec. 2000, at 57-69.

¹⁶ 9/11 COMM'N, FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 237 (2004).

do to us, but what we can do to ourselves when we are spooked.¹⁷ In that context, we must think about how we manage the threat, but manage the threat in such a way that we keep it into perspective of our overarching values or overarching of goals and objectives as a nation, and not end up throwing the baby out with the bath water.

I argue this: essentially with the benefit of hindsight, there were three core lessons that we could draw from September 11th. The first one I would argue has been too well-learned, and it is this: there are bad people out there intent on killing some of us here.¹⁸ That one we got down. And the prescription has been we need to do whatever it takes to go there to get them first.¹⁹ I think I have just summarized what has been the bulk of the strategy the United States has adopted with dealing with the terrorism threat as it appeared on September 11th.

But arguably the second lesson, partially-learned one, is this: that their new battle space for not just this adversary, Al Qaeda, or future adversaries, will be in the civil economic space.²⁰ That is the current way which future adversaries are likely to confront particular U.S. power, but the broad sort of collective shared interest of the live nations about managing a world in the kind of way that we have chosen. The way in which that would be challenged is not the 'no snows' approach, and one which way I try to accentuate that reality about why we are more likely to move into battle that takes place in the civil economic space is by two numbers.

One is in 2004, the United States set spending more in conventional military capability than the entire world combined.²¹ And for these last four years, we have been leaving everybody else in the rear-view mirror. Put that in its further context, our United States Navy is larger than the next 18 navies combined.²² That said, that to me is in warfare, we have one of two options

¹⁷ See John Mueller, *Simplicity and Spook: Terrorism and the Dynamics of Threat Exaggeration*, 6 INT'L STUDIES PERSPECTIVES 208 (2005); BARRY GLASSNER, *THE CULTURE OF FEAR* (Basic Books 2000).

¹⁸ See, President's Daily Briefing, "Bin Ladin Determined to Strike in US", available at <http://www.washingtonpost.com/ac2/wp-dyn/A2285-2004Apr10>.

¹⁹ See, Dieter Janssen, *Preventive Defense and Forcible Regime Change: A Normative Assessment*, 3 J. MIL. ETHICS 105 (2004).

²⁰ See, Podcast: Stephen Flynn on Girding the Homeland, Council on Foreign Relations, available at http://www.cfr.org/publication/15659/stephen_flynn_on_girding_the_homeland.html.

²¹ World Wide Military Expenditures, <http://www.globalsecurity.org/military/world/spending.htm> (last visited Sept. 20, 2008).

²² American Society of Civil Engineers Online, *Resilience is Key to Resisting Terrorist Threats and alleviating Nation Infrastructure Woes, Says Flynn*, available at http://pubs.asce.org/magazines/ascenews/2008/Issue_01-08/article2.htm (citing Stephen Flynn author of *THE EDGE OF DISASTER: REBUILDING A RESILIENT NATION* (Random House 2007) for proposition that U.S. Navy is larger than next 17 navies combined).

with adversaries. One, dumb one, take the stuff home. Two, to future adversaries, say let us try a different way. I am voting for two, they will try a different way.

Now the second piece, Iran is much in the news these days as a potential adversary.²³ I would like to put this into context. Iran's gross domestic product last year was \$600 billion,²⁴ which is roughly 20 percent less than what the United States is spending on its defense budget in using it in Iraq and Afghanistan.²⁵ The entire economy of Iran is less than the defense budget of the United States. So if Iran at some point in time decides it is going to confront U.S. powers some way, it is probably not going to look like taking that stuff on. It is unlikely to be in the civil economic space, but here we see as I partially learned, how do I make that conclusion? There is some rhetoric that says "yeah, we acknowledge that we have new unconventional warfare." But when you are going to look at what your resources are, they just do not bear out. Here are a couple of stark numbers. The President, just this year, has asked for \$12.3 billion for ballistic missiles defense research and development.²⁶ This is on top of the \$120 billion the United States has spent since 1986.²⁷ Now there are five countries on the planet that have intercontinental ballistic missiles, that this technology, if it ever was developed and operationalized and realistically tested could actually begin that, and those are the U.K., France, us, and Russia and China.²⁸ The complexities developing in the nuclear missile is substantial, not likely to be a foreseeable one, and yet we got \$12.3 billion continued research and development there.²⁹

The President also this year asks for a total of \$220 million for port security grants.³⁰ The total amount of money that can be made available to

²³ See, e.g., Noah Feldman, *Buildup to The Next War*, N.Y. TIMES, Aug. 10, 2008, at MM9; Fouad Ajami, *Iran Must Finally Pay a Price*, WALL ST. J., May 5, 2008, at A15.

²⁴ International Monetary Fund, World Economic Outlook Database, <http://www.imf.org/external/ns/cs.aspx?id=28> 1 (last visited Sept. 21, 2008) (2006 G.D.P. based on purchasing-power-parity valuation of country GDP).

²⁵ Budget of the United States Government, Department of Defense, 2008 (Estimated), <http://www.gpoaccess.gov/usbudget/fy09/pdf/budget/defense.pdf> (last visited Sept. 21, 2008) (the total Department of Defense discretionary budget authority for 2008 was \$668.6 billion).

²⁶ Cf., Missile Defense Agency, Historical Funding of MDA FY85-08, <http://www.mda.mil/mdalink/pdf/histfunds.pdf> (last visited Oct. 26, 2008) (President requested \$8.9 billion for 2008).

²⁷ *Id.* (Accumulative funding from 1986-2008 totaled \$114.3 billion).

²⁸ Arms Control Association, Worldwide Ballistic Missile Inventories, <http://www.armscontrol.org/factsheets/missiles> (last visited Oct. 26, 2008).

²⁹ See, Missile Defense Agency, *supra* note 26.

³⁰ See, Dep't of Homeland Security, Overview: FY 2008 Infrastructure Protection Activities, http://www.dhs.gov/xlibrary/assets/fy2008_infrastructure_protection_activities.pdf (last visited Oct. 26, 2008).

ports around the country to manage the threat which, I think most experts would argue, is more probable, is in some other conveyance, not a missile, where \$220 million is sort of chump change.

Putting it together, drawing this even further contrast. This year the President has asked for \$198 billion in supplemental for war in Iraq and Afghanistan.³¹ Do that arithmetic; it works out to \$542 million each day. So the total amount he has asked for port security, grants, is 12 hours in Iraq. That, I would suggest to you, is a country that is still operating on the way in which you conduct with this new mass security paradigm is with traditional mass security tools, and you do not reallocate the sources of strategy, you can only have direction.

The third unlearned lesson of 9/11, which I think is the most straightforward one, is that the only way to actually safeguard that space is to enlist as many participants who are in it as possible to be a part of the effort.³² If they knew battle space was civil economic space, then you have better get the private sector, and you better get the people who live in that space involved with that.

Now why was that a core lesson in 9/11? I would argue it should have been the dominant lesson of September 11th. In fact, I would go so far as to say we got it wrong. On September 11th, what Washington took away, and the rest of the country followed, was that the dominant narrative of that day was what happened on the first three planes. The two planes that went into The Twin Towers and took them down and then the last one that sliced open the Pentagon.³³ But the dominant lesson of September 11th I would argue should have been what happened on the fourth plane, United 93.³⁴

United 93 of course was the plane that left Newark late,³⁵ and as a consequence of the fact that the terrorists were cocky enough not to prevent the passengers on board from being able to grab the phones at the center of the seats and call their friends and loved ones, and find out something that the people in the first three planes did not know: that these terrorists intended on using the planes as missiles.³⁶ Armed with that information, they did something very important. They went after the cockpit and prevented that plane from going to its ultimate destination, which almost certainly was

³¹ See, OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, FY 2008 EMERGENCY BUDGET AMENDMENTS: OPERATION IRAQI FREEDOM, OPERATION ENDURING FREEDOM, AND SELECTED OTHER INTERNATIONAL ACTIVITIES, (Oct. 19, 2007) *available at* http://www.whitehouse.gov/omb/budget/amendments/amendment_10_22_07.pdf.

³² See, Charles Boehmer, Erik Gartzke, & Quan Li, *Investing in the Peace: Economic Interdependence and International Conflict*, 55 INT'L ORG. 391 (2001).

³³ See, 9/11 COMM'N, *supra* note 16 at 4-10.

³⁴ *Id.* at 10-14.

³⁵ *Id.*

³⁶ *Id.*

America's seat of government.³⁷ Think of the irony of this. Our government, which we constitute in the United States to provide for the common defense, that the people gathered on Capital Hill that day who had sworn their duty, were themselves defended by one thing and one thing alone: great everyday Americans.

The dominant lesson of September 11th, I argue, is not that they need to do whatever it takes, which is allow our government to do whatever it takes to take battles to the enemy, but it is that when we are confronted with a threat that is looking like the one that we have today, we need all of us engaged. We are civilians who are as it turns out to be likely to be the first preventers and first responders. We need a private sector which likely is placed with targets most likely to happen. When you talk about that space, you are talking about it in a transnational context on the domestic context. This is where the border really comes in.

I had the experience here, most recently a couple years ago, to get myself in the crosshairs of the Dubai Ports World debacle, or fiasco.³⁸ Dubai Ports World, as I recall, is the company,³⁹ which is formed largely by American executives formerly with SeaLand.⁴⁰ In fact, SeaLand was the company that first set up the port in Dubai, ran it, run by Americans the first 10 years of its life.

The Americans, who were displaced when SeaLand was bought by Maersk and then came together and put together a company called Dubai Ports World,⁴¹ were interested in buying some leases owned by Pacific and Orient Line, and had taken advantage of that commercial opportunity. It turns out we got into a rather interesting frenzy in the U.S. about this particular purchase.⁴² What it really illustrated was three things that should concern all of us.

The first was that Americans had no understanding how the global Maritime transportation system worked.⁴³ The kinds of things that were said about what this purchase was about, and how it was working and so forth, people were clueless. And that was people from elected officials on down asking and so forth. Secondly, it was very little appreciation of the value of

³⁷ *Id.*

³⁸ See, Stephen E. Flynn, *A Port in the Storm Over Dubai*, N.Y. TIMES, Feb. 28, 2006, at A19.

³⁹ See, DP World, <http://www.dpa.co.ae/> (last visited Oct. 31, 2008) (corporate website).

⁴⁰ See, DP World, George Dalton, http://portal.pohub.com/portal/page?_pageid=761,252854&_dad=pogprtl&_schema=POGPRTL (last visited Sept. 22, 2008).

⁴¹ See, DP World, *supra* note 39.

⁴² See, Flynn, *supra* note 38.

⁴³ *Id.*

what that industry played in our economy.⁴⁴ And third, it was virtually no appreciation for the security of the system put in place.⁴⁵

Of those three things, the only one that was forgivable was the last: lack of concern about security or the apprehension about security of the system. But essentially people did not understand, did not value, and did not have confidence in the security.⁴⁶ The result was a nativist backlash that led to the legislation that goes back by one man who wanted to be President, Duncan Hunter,⁴⁷ the Chairman of the Armed Service Committee,⁴⁸ the one who wanted to have all critical infrastructure of the United States owned by U.S. companies. That was the piece of legislature he touted out.⁴⁹

Now, I remember talking to staff about this and in a hearing, saying, “of course we are going to be eyeing up heartlands and go back.” And, “we will have to pick up those natural [gas] pipelines up in British Columbia and Alberta.”⁵⁰ And, “ports are really on-ramps and off-ramps, so I guess we better get deep pockets, we are going to be buying ports around the planet.” The very nature of this challenge clearly is about a globalized network that we have to have really good partners with. And the Dubai Ports World, the second largest terminal [operator] in the planet,⁵¹ have been kicked by the United States,⁵² and that is a great way I am sure to inspire their cooperation to putting controls in place.

The reality here is that these networks, our relationships and our economy, are tied solely independently, particularly in the North American context, with our neighbors who have global networks.⁵³ The way in which they actually manage this—these series of challenges that now we call homeland security for border control, really need to be breasted into that broader context. And this is something that Americans, I would argue, have had a very difficult time understanding, and our leadership has obviously

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ See, Duncan Hunter for President, <http://www.gohunter08.com> (last visited Sept 23, 2008).

⁴⁸ U.S. House of Representatives, Armed Services Committee, <http://armedservices.house.gov/> (last visited Sept 22, 2008).

⁴⁹ H.R. 4881, 198th Cong. (2006).

⁵⁰ See, Spectra Energy Transmission, BC and Alberta Systems Map, https://noms.wei-pipeline.com/CustomerContent/systems_map/Spectra_BC_AB_Systems_Map.pdf (last visited Sept 23, 2008).

⁵¹ Contra Tony Karon, *Who's Behind the Dubai Company in U.S. Harbors?*, TIME, Feb. 26, 2006.

⁵² See, Flynn, *supra* note 38.

⁵³ See generally, Anthony DePalma, *International Business; With the U.S. Economy Slumping, Canada and Mexico Are Reeling*, N.Y. TIMES, Dec. 17 2001, available at <http://query.nytimes.com/gst/fullpage.html?res=9A03E3D71F3FF934A25751C1A9679C8B63>

failed in outlining that reality and providing guidance in how to move forward.

So how do we move forward? The case I would make is that we need to step away from a mindset that is driven around this notion of security, an increasing embrace of a concept that I am trying to advance called "resilience."⁵⁴ That the way in which we deal with the current threat that we are looking at, particularly in the area of terrorism. But I argue we need to be more worried about threats, probably in terms of the probability and consequence, that are coming from natural sources;⁵⁵ we need to be more resilient as societies to manage the transnational threats that confront us, as societies, plural, and in cooperation with one another. That is something that I think we really need to address.

The first point that we need to set forth are things like security tax, and that the security that we put in place after 9/11 is imposing costs on our relationship, or commercial relationship, increasingly. In fact, they compromise our political relationship in ways that are conflict to us. I would argue this is nonsense. So you are not seeing a security tax, what you are seeing is an enforcement tax. What we see is a confluence of enforcement with security which is simply not supportable in reality. What we generally have seen is a view that more law enforcement equals more counterterrorism, and that is simply not the case.⁵⁶

Our army has had a heck of a time learning from Iraq, and they are starting to learn it, and they have a counterinsurgency there that recognizes two critical things. That in order to be successful in counterinsurgency, the security objective is not to alienate the population and you do not do things predictable.⁵⁷ Think about what we are doing at our borders, alienating everybody and doing things predictably.⁵⁸ That might be a great formula for success for security, and maybe enforcement, but it is not. It is not dealing with the threat that we are dealing with in terms of the terrorism threat which ultimately must be dealt with in a more nuanced and counterintuitive way.⁵⁹

⁵⁴ Stephen E. Flynn, *America the Resilient*, FOREIGN AFF., Mar./Apr. 2008, at 2.

⁵⁵ *Id.*

⁵⁶ Compare, Jeff Breinholt, *Seeking Synchronicity: Thoughts on the Role of Domestic Law Enforcement in Counterterrorism*, 21 AM. U. INT'L L. REV. 157 (2005) (contending that domestic law enforcement and intelligence is the key to counterterrorism efforts), with National Strategy for Fighting Terrorism, Sept. 2006, <http://www.whitehouse.gov/nsc/nsct/2006> (last visited Sept. 23, 2008) (advocating the use of military, diplomatic, financial, intelligence, avenues in addition to law enforcement).

⁵⁷ See, Eliot Cohen, Conrad Crane & Jan Horvath, *Principles, Imperatives, and Paradoxes Of Counterinsurgency*, 86 MIL. REV. 49 (2006); Thomas E. Ricks, *It Looked Weird and Felt Wrong*, WASH. POST, July 24, 2006 at A01.

⁵⁸ See, Shirley Won, *U.S. border tightening starts to hit tourism*, GLOBE & MAIL, Feb. 16, 2006, at B9.

⁵⁹ See, Cassandra Florio, Sean McCarthy, & Alexander Moens, *Canadian American Rela-*

My short hand on security I have tried to advance with virtually no success is a reality that security, when done right, is almost always nuanced; it is always nuanced and almost always counterintuitive.⁶⁰ Tough security is always simple, which makes it politically and bureaucratically effective and always ineffective because it is rote, ritualistic, and also ultimately it alienates the people who are associated with it.⁶¹ So when we think about how we need to move forward, one is, we need to be very clear that there is a distinction between enforcement, the kinds of things we do at borders around enforcement, and security. We need to basically make sure that what we are doing is not being taken hostage by the security objective which really is enforcement on steroids, and we are willing to think about security and how it has accomplished a nuanced, and in some cases, in a counterintuitive way which is usually about cooperation and engagement.⁶²

Now, this is where I believe resilience really works as a formula for versus security. Let me define quickly with what I call "Four R's." Resilience is first built around robustness.⁶³ You basically look at the things that are truly critical by the kinds of things, bridges and tunnels that connect our trade relationships, global supply chains, transport and so forth there, energy, so forth, and you say, "what are foreseeable threats to those things that are critical that we may anticipate happening which would have high consequence?" Then based on that formula, we basically take measures upfront to strengthen them to withstand those forces. The old world we were re in was built around safety. What if human error or Mother Nature did this? Now we just need to add another one. What if malicious intent went after something that was critical? If it was consequential, we needed to put robustness up front. Robustness in some cases is a structure, is hardening of sorts. It is making buildings that can withstand earthquakes kind of thing. But it also, often it is substitutability. It is the redundancy in some cases. Stability is "something is wrong here, switch over there so the system stays alive."

So the first element is robustness. The second R that I would put on the list is resourcefulness. Resourcefulness is really when things start to go wrong, you can detect it quickly and do an alert to the players who need to be

tions in 2007, FRASER INST., May 1, 2007, available at http://www.fraserinstitute.org/commerce.web/product_files/CanadianAmericanRelations2007.pdf.

⁶⁰ See, Cohen et al., *supra* note 57.

⁶¹ *Id.*

⁶² See, Audrey Kurth Cronin, *Behind the Curve: Globalization and International Terrorism*, 27 INT'L SEC. 30 (2002).

⁶³ See, Flynn, *supra* note 38.

able to respond to this incident.⁶⁴ It is a crisis management function, and it is heavily on human capital versus technology.⁶⁵

The third R is recovery. Something's happened; you need to get it back quickly. And the fourth R is review, learn from what is happening, and reinvest it back into robustness, resourcefulness, and recovery.

Now, that broad resilience focus I would argue does two great things for us in thinking about how we go forward as a North American continent dealing with the hazard of terrorism as well as the other natural hazards that typically we are trying to manage at our borders. One is: you cannot achieve it unless there is an open inclusive process.⁶⁶ You have to bring in the people who will design systems and operate the system to figure out how you build the robustness,⁶⁷ how you engage the resourcefulness in the same kind of way United 93 drew in where people were drawn into the problem, and often in many cases are part of the solution. So that is a critical part you have. Also there is a recognition with resiliency. You do not prevent everything.⁶⁸ Some things go wrong.⁶⁹ We have to accept that reality. But thirdly, and I think this is most important for our values shared across the North American continent, is resiliency. At its heart, it is built on a foundation of confidence and optimism.⁷⁰ You are saying, "whatever happens, we will bounce back and well be just as good, if not better, the next time around."⁷¹ Security though is often built around our fears,⁷² and that is something that I would argue works against our optimistic, confident character.

And so, I suggest for a future conference, we not talk about how we secure borders or how we balance border security with commerce, but talk about how we build resiliency in the critical infrastructures, the relationships that are key for our shared societies, that we move out of this vernacular.

I will make a final point on this with regard to security, which is one thing I guess I have learned most since spending time on the border. Whenever you hear somebody say we need to balance security with efficiency of commerce, run for cover.⁷³ This is not only like the people who advance on that idea are

⁶⁴ See, Flynn, *supra* note 38.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ See, Philip Shenon, *Threats And Responses: Warnings; Security Chief Says Nation Must Expect Suicide Attacks*, N.Y. TIMES, Mar. 13, 2003, at A13 (warning that inevitable suicide bombing attempts in the United States will be difficult to prevent).

⁶⁹ *Id.*

⁷⁰ See, Flynn, *supra* note 38.

⁷¹ *Id.*

⁷² H.L. Goodall, Jr., *Twice Betrayed by the Truth: A Narrative About the Cultural Similarities Between the Cold War and the Global War on Terror*, 8 CULTURAL STUD./CRITICAL METHOD. 353 (2008).

⁷³ See, Maureen Appel Molot, *The Trade-Security Nexus: The New Reality in Canada-U.S.*

not interested in balance entirely, but usually is where it fundamentally breaks down.

I cannot achieve security in an inefficient environment.⁷⁴ If a security measure puts in place a barrier that essentially causes an environment to behave in a disruptive way, it becomes less policeable.⁷⁵ It becomes less secure.⁷⁶ Any security measure that is not designed organically and dynamically with that environment ultimately undermines security because what you get really is increasing friction and chaos and in some cases, the informal ways to work around it that ultimately make the environment less secure.⁷⁷ And so the fact is we should not allow politicians or agency heads or others to say "I am balancing."

The requirement is, how are you integrating security into the overall objective which is a resilient system? I think we can move to that level of thinking. We will make sure that we sustain the kind of relationship that is remarkable, and the prosperity is generated, and the shared values that we all have, which is the one we have between our two nations, Canada and the United States. Thank you so much for your attention tonight.

(Session concluded.)

Economic Integration, 33 AM. REV. CAN. STUD. 27 (2003).

⁷⁴ See, Stephen E. Flynn, *The New Reality in Canada/U.S. Relations: Reconciling Security and Economic Interests and the "Smart Border Declaration"*, 29 CAN.-U.S. L.J. 9, 14-17 (2003).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

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CANADA-UNITED STATE LAW INSTITUTE ANNUAL CONFERENCE

On

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APRIL 19, 2008

